

Appeals Board No. T-1002368-001-BR

In the Matter of:

X

ESA- TAX UNIT
ROBERT DUNN III
ASSISTANT ATTORNEY GENERAL,
1275 W. WASHINGTON ST CFP/CLA
PHOENIX, AZ 85007-2926

Employer

Department

DECISION
AFFIRMED UPON REVIEW

The **EMPLOYER** requests review of the Appeals Board decision issued on December 7, 2006, which affirmed the Reconsidered Determination issued on October 27, 2005, and held that:

1. The Employer is liable for Arizona Unemployment insurance taxes beginning October 1, 2000, under A.R.S. § 23-613.
2. Services performed by individuals as nurses constitute employment as defined in A.R.S. §§ 23-613.01, 23-615 or 23-617, and such individuals are employees within the meaning of A.R.S. § 23-613.01 and Arizona Administrative Code, Section R6-3-1723.
3. The remuneration paid to individuals for the services performed, constitutes wages within the meaning of A.R.S. § 23-622, which must be reported and on which state taxes for unemployment insurance are required to be paid.

The request has been timely filed and the Appeals Board has jurisdiction in this matter pursuant to A.R.S. § 23-672(F).

In the request for review, the Employer's owner (Tr. p. 27) contends that the Employer was a corporation, and that she should not be personally liable. We infer that the owner contends that, if the Department attempts to collect on a Notice of Assessment (such as Board Exh. 5), she should not be liable. The issue of the correctness of any Notice of Assessment is not before the Board in this case. In any event, the Appeals Board has no jurisdiction to determine what individuals or entities would be liable for obligations of the Employer.

The Employer contends that the business was started as a registry with nurses working under independent contractor agreements. The Employer contends that the nurses did not expect they would receive benefits, have taxes deducted from earnings, or that they would have workers compensation or unemployment benefits. The Claimant states that she paid an attorney to set up independent contractor agreements so that the work arrangements would be legal.

The issue is not whether the arrangement is legal or illegal, or whether workers accept or want a particular arrangement, but whether the individuals who performed services for the Employer were employees so as to constitute employment. Employment means any service of whatever nature performed by an employee for the person employing him. An employee means any individual who performs services for an employing unit and who is subject to the direction, rule or control of the employing unit as to both the method of performing or executing the services and the result to be effected or accomplished. An employee does not include an independent contractor.

The Employer has the burden of proving that a worker is an independent contractor. The Department has established that the nurses were employees. The Employer has not met the burden of proof to establish that the nurses were independent contractors.

The existence of an independent contractor agreement is some evidence of the proposed arrangement. However, the actual practice under the contract is more important in determining the degree of control the Employer can assert and the degree of independence the worker actually has. "Control" as used in A.R.S. § 23-613.01, includes the right to control as well as control in fact.

The reason a worker and a potential employer may not merely decide to use an independent contractor arrangement is set out in two cases:

The Arizona Court of Appeals, in the case of Arizona Department of Economic Security v. Little, 24 Ariz. App 480, 539 P.2d 954 (1975), made it clear that all sections of the Employment Security Law should be given its long

established liberal construction in an effort to include as many types of employment relationships as possible, when it stated:

The declaration of policy in the Act itself is the achievement of social security by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment [See A.R.S. § 23-601].

This view was reiterated by the Arizona Court of Appeals, in the case of Warehouse Indemnity Corporation v. Arizona Department of Economic Security, 128 Ariz. 504, 627 P.2d 235 (App. 1981), where it stated:

The Arizona Supreme Court has noted, however, that the Arizona Employment Security Act is remedial legislation. All sections, including the taxing section, should be given a liberal interpretation... (emphasis added).

We have thoroughly examined the facts present in this case, including the factors that have the practical effect of preventing a nurse, assigned to a client by the Employer, from becoming employed by a client. We have considered the relevant law and administrative rules as they are applicable to those facts. We also have considered the evidence as it relates to the factors set out in the Arizona Administrative Code, Section R6-3-1723(D) and (E), and conclude that the services performed by individuals as nurses constitute employment. In our analysis, there were no factors leading to a conclusion that the nurses were independent contractors. There were 12 factors leading to the conclusion that the nurses were employees. There were 6 factors that were not applicable, given the facts and the type of work performed.

We continue to find that, based on the quarterly wages of those we find as employees, the Employer is liable for Arizona Unemployment insurance taxes.

The Board's prior decision is fully supported by the greater weight of the credible and probative evidence of record.

THE APPEALS BOARD FINDS that:

1. The **EMPLOYER** has not submitted any newly-discovered material evidence which, with reasonable diligence, could not have been discovered and produced at the time of any hearing;

2. There was no prejudicial irregularity in the administrative proceedings on the part of the Department. Specifically, there was no material

or prejudicial error in the admission or exclusion of evidence and no prejudicial errors of law were made at any hearing or during the progress of this matter;

3. There was no accident or surprise in the proceedings which could not have been prevented by ordinary diligence;

4. The Appeals Board's decision involved no abuse of discretion depriving any party of a full and fair hearing, and it was supported by the greater weight of the credible evidence and by applicable law;

5. All interested parties were notified of the filing of the request for review, and were allowed at least 15 days in which to respond. Accordingly,

THE APPEALS BOARD **AFFIRMS** its decision, there having been established no good and sufficient grounds which would cause us to reverse or modify that decision, or to order the taking of additional evidence.

DATED:

APPEALS BOARD

MARILYN J. WHITE, Chairman

HUGO M. FRANCO, Member

WILLIAM G. DADE, Member

PERSONS WITH DISABILITIES: Under the Americans with Disabilities Act, the Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service, or activity. For example, this means that if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your

disability, please let us know of your disability needs in advance if at all possible. Please contact the Appeals Board Chairman at (602) 229-2806.

RIGHT OF APPEAL TO THE ARIZONA TAX COURT

This decision on review by the Appeals Board, is the final administrative decision of the Department of Economic Security. However, any party may appeal the decision to the Arizona Tax Court, which is the Tax Department of the Superior Court in Maricopa County. If you have questions about the procedures on filing an appeal, you must contact the Tax Court at (602) 506-3763.

For your information, we set forth the provisions of Arizona Revised Statutes, § 41-1993(C) and (D):

C. Any party aggrieved by a decision on review of the appeals board concerning tax liability, collection or enforcement may appeal to the tax court, as defined in section 12-161, within thirty days after the date of mailing of the decision on review. The appellant need not pay any of the tax penalty or interest upheld by the appeals board in its decision on review before initiating, or in order to maintain an appeal to the tax court pursuant to this section.

D. Any appeal that is taken to tax court pursuant to this section is subject to the following provisions:

1. No injunction, writ of mandamus or other legal or equitable process may issue in an action in any court in this state against an officer of this state to prevent or enjoin the collection of any tax, penalty or interest.
2. The action shall not begin more than thirty days after the date of mailing of the appeals board's decision on review. Failure to bring the action within thirty days after the date of mailing of the appeals board's decision on review constitutes a waiver of the protest and a waiver of all claims against this state arising from or based on the illegality of the tax, penalties and interest at issue.

3. The scope of review of an appeal to tax court pursuant to this section shall be governed by section 12-910, applying section 23-613.01 as that section reads on the date the appeal is filed to the tax court or as thereafter amended. Either party to the action may appeal to the court of appeals or supreme court as provided by law.
4. The action cannot be initiated or maintained unless the appellant has previously filed a timely request for review under section 23-672 or 41-1992 and a decision on review has been issued.

A copy of the foregoing was mailed by certified mail on to:

(x) Er: X Acct. No: X

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By: _____
For The Appeals Board